FILE COPY

Supreme Court, U
FILE
JUN 22 19
MICHAEL RODAK, JR.,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1595

RALPH COX, JR., AND OCEAN AIR TRADEWAYS,

Petitioners,

v.

WALTER E. HELLER & COMPANY, INC.,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

GEORGE A. KATZ
299 Park Avenue
New York, New York 10017
Attorney for Respondent

BERNARD MINDICH
ALLEN P. ROSINY
WACHTELL, LIPTON, ROSEN & KATZ
Of Counsel

June 21, 1973

INDEX

	PAGE
Opinions Below	1
Jurisdiction	1
Question Presented	2
Statute Involved	2
Statement of the Case	2
Argument	8
I. The Decision Below is Clearly Correct	9
II. The Petition Does Not Raise Any Issue Requiring Review By This Court	13
Conclusion	14

CITATIONS

Cases:

American Nat. Bank & Trust Co. of Chicago v. *United States*, 142 F.2d 571 (D.C. Cir. 1944) 9, 10, 11

Broder v. *Hartford Acc. & Indemnity Co.*, 106 F. Supp. 343 (D.D.C. 1952) 9

Byrd v. *Blue Ridge Rural Electric Cooperative, Inc.*, 356 U.S. 525 13

Erie R. Co. v. *Tompkins*, 304 U.S. 64 13

Fischer v. *Dover S.S. Co.*, 121 F. Supp. 528 (E.D.N.Y. 1954) 9

Hanna v. *Plumer*, 380 U.S. 460 ..... 12, 13

Hicks v. *Bekins Moving & Storage Co.*, 115 F.2d 406 (9th Cir. 1940) 9

PAGE

Kern v. *Hettinger*, 303 F.2d 333 (2d Cir. 1962) . . 9, 10, 12, 13

Larsen v. *O'Reilly*, 11 F.R.D. 604 (S.D.N.Y. 1951) . . 9

Nasser v. *Isthmian Lines*, 331 F.2d 124 (2d Cir. 1964) 9

Perlman v. *332 West Seventy-Second Street, Co.*, 127 F.2d 716 (2d Cir. 1942) 9

Weissinger v. *United States*, 423 F.2d 795 (5th Cir. 1970) 9, 10

Statutes and Rules:

Federal Rules of Civil Procedure:

Rule 41(b) 2, 5, 6, 8, 9, 10, 11, 12, 14

Rule 41(c) 2, 6, 9

General Orders in Bankruptcy:

Order 37 12

New Jersey Civil Rules:

Section 1:2-4 12

Section 4:37-2(d) 12

Section 4:42-2(b) 12

Other Authorities:

1 Collier, on *Bankruptcy*, ¶ 2.81 (14th ed. 1971) . . . 12

In the

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1595

Ralph Cox, Jr., and Ocean Air Tradeways,

Petitioners,

v.

Walter E. Heller & Company, Inc.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF RESPONDENT IN OPPOSITION

Opinions Below

The Opinions below are adequately set forth in the Petition.

Jurisdiction

The jurisdiction below was based upon diversity of citizenship (28 United States Code § 1332).

Question Presented

Is it error for a Federal District Court to hold that a Federal Referee in Bankruptcy's order of dismissal, which did not specify that the order was entered *without* prejudice, was a dismissal *with* prejudice where: (a) Rules 41(b) and (c) of the Federal Rules of Civil Procedure expressly state that such an order of dismissal, other than upon grounds not relevant herein, is *with* prejudice unless otherwise specified; (b) the Bankruptcy Court is subject only to the Federal Rules of Civil Procedure; (c) the testimony offered by the parties attacking the order established that the Referee in Bankruptcy never stated the dismissal was without prejudice; and (d) the Referee in Bankruptcy subsequently issued an opinion flatly stating that the order of dismissal was intended to be *with* prejudice?

Statute Involved

The pertinent provisions of Rules 41(b) and (c) of the Federal Rules of Civil Procedure are set forth in the Petition at pp. 7-8.

Statement of the Case

This litigation arises from a loan made by respondent to United States Overseas Airlines, Inc. ("USOA"), as to which petitioners had executed contracts of guaranty. In view of the narrow question raised by the petition for certiorari, the history of respondent's dealings with USOA prior to the latter's filing of a petition in bankruptcy may be omitted.

In September, 1966, several months after the institution of this litigation to enforce respondent's rights against petitioner Cox ("Cox") on his guaranty and just as respondent was about to proceed with a substantial sale of

USOA's assets, USOA (through Cox, its president) filed a Chapter XI petition in the federal bankruptcy court for the District of New Jersey (Exh. 1e).*

Shortly after the filing of the Chapter XI petition, respondent, in order to collect on USOA's secured indebtedness, filed a Notice of Motion and Petition for Leave to Sell certain assets of USOA (Exh. 4e). At Cox's personal direction (Doc. 27a, pp. 11-12; 44-45; 51; 63-71; Exh. 9e; 35e; 36e; 101e; 103e; 111e; 113e) and with the advice of all of the other partners of petitioner Ocean Air Tradeways ("OAT") (Doc. 27, pp. 51, 57, 60-61 Doc. 28a, p. 101), USOA proceeded to launch a full scale attack upon both the amount of its indebtedness to respondent and the validity of respondent's lien (Doc. 27a, pp. 9-14; Doc. 37a, pp. 1516-17; Exh. 101e, pp. E-348-49). Respondent was required to prove its lien in full, and thus, at a trial before Referee in Bankruptcy William Lipkin during November and December, 1966, respondent produced substantial documentary and testimonial evidence in support of its petition (Doc. 32a, p. 560; Doc. 33a, p. 596). Counsel for USOA engaged in a vigorous and extensive cross-examination of respondent's executive vice-president in order to establish the invalidity of respondent's claim or to reduce the amount thereof (Doc. 27a, pp. 9-14; Doc. 37a, p. 1516). Among other things, USOA's counsel, with the direct aid and assistance of petitioners Cox and OAT, raised questions concerning alleged prepayment, previous sales of collateral, and various alleged misdeeds by respondent with respect to the guaranteed loan which formed the basis of the present litigation.

On January 17, 1967, after the completion of the aforesaid trial, Referee Lipkin rendered his "Findings of Fact, Conclusions of Law and Order" in which he conclusively

---

* References bearing the designation "Exh." and the suffix "e" are to respondent's Appendix of Trial Exhibits in the Court of Appeals. References bearing the designation "Doc." and the suffix letter "a" are to petitioners' Appendix in the Court of Appeals.

adjudicated the validity of respondent's claim and established a lien as of November 15, 1966 (the date upon which testimony had commenced) in the amount of $152,232.07 (Exh. 5e).

Since this indebtedness was the very same indebtedness which was at issue in the present litigation and since petitioners were found to be in complete privity with USOA, the District Court in this proceeding concluded that the aforesaid Findings of Fact, Conclusions of Law and Order were *res judicata* against the petitioners and constituted a bar to any relitigation of the issues thereby determined. Petitioners do not challenge that conclusion in their present petition.

However, the Referee's Order of January 17, 1967 had left open to USOA the opportunity to assert any counterclaims against respondent which might in fact be thereafter shown to exist by virtue of new matter which USOA might thereafter discover by means of written interrogatories which respondent was required to answer in great detail (Exhs. 6e and 7e). On March 31, 1967, USOA, supported by petitioner Cox's affidavit, filed a motion in the Bankruptcy Court for leave to assert extensive counterclaims against respondent seeking damages on behalf of itself and OAT (Exh. 9e). Despite the fact that all of these matters had, or could have, been heard by the Bankruptcy Court in the determination of respondent's lien (Exh. 10e, pp. E-209-212; see also Exh. Ae, pp. E-6-7), Referee Lipkin, desiring to afford USOA the fullest opportunity to be heard, permitted the submission of the counterclaims and required respondent to reply thereto. Respondent submitted a detailed evidentiary response in the form of an affdavit with supporting documentary proof (Exh. 10e). A trial date was thereafter scheduled.

On April 20, 1967, USOA's then designated counsel moved to withdraw from the proceedings (Exh. 34e). An order of the Referee entered May 15, 1967 permitted the withdrawal and required USOA to obtain new counsel by

June 2, 1967 and set the hearing for the trial of its counterclaims for July 11, 1967 (Exh. 35e). On June 13th and again on June 30, 1967, respondent wrote to Cox advising him that, contrary to the order of May 15, 1967, it had not been informed of the retention of new counsel for USOA and that it would move for the dismissal of the counterclaims unless USOA complied with that order (Exh. 103e). On July 11, 1967, the return date of the hearing, USOA still had not retained counsel. The Referee then wrote to petitioner Cox to advise him that the hearing would be adjourned "for a final time" to July 25, 1967, and that if USOA was not ready to proceed on that date, the bankruptcy court would hear respondent's motion to dismiss. Cox ignored this warning and July 25th came and went without either a hearing or the appointment of counsel. On July 26, 1967, new counsel did file a Notice of Appearance for USOA, and the hearing was once again postponed until August 28, 1967.

On August 28, 1967, the newly retained local counsel appeared before Referee Lipkin totally unprepared to proceed with the trial of the counterclaims (Doc. 33a, p. 678; Exh. Ae, p. E-14). In fact, as established by correspondence between new counsel and Cox, these attorneys never agreed to do anything more than serve as local counsel, and neither they nor Cox had ever intended that they would try the case (Exh. 113e; Exh. Ae, p. E-14).*

Frustrated by USOA's continual delay and negligence, Referee Lipkin stated that he would enter an order dismissing the counterclaims, and such an order was entered on August 29, 1967 (Exh. 11e). While this order did not expressly state that the dismissal was with prejudice, the effect of Rule 41(b) of the Federal Rules of Civil Procedure,

---

* The above-stated facts clearly belie the statement made by petitioners that their presentment of counterclaims was adjourned and re-set several times "for various [reasons] attributable to the convenience of the parties and the court." (Petition, p. 5).

together with USOA's contumacious refusal to obey the Referee's previous orders to proceed, made it clear that the order was intended to be "with prejudice" and an adjudication on the merits. Accordingly in the District Court below respondent argued, and the Court held, that the Referee's order of dismissal was an additional ground for *res judicata* barring petitioners from asserting the same matters set forth in the dismissed counterclaims.

At the trial petitioners attempted to challenge the foregoing *res judicata* conclusion by arguing that the Referee's order of dismissal should have been deemed to be "without prejudice" and therefore not an adjudication on the merits upon which a finding of *res judicata* could be based. This was argued on the primary basis that the trial testimony of USOA's former counsel had purportedly established that certain alleged remarks of the Referee prior to the signing of his order indicated that the Referee did not intend to dismiss the claim "*with* prejudice." Petitioners admit, however, that the Referee expressly *refused* to state that his order of dismissal was to be "*without* prejudice" (Doc. 33e, pp. 682, 693, 697). Moreover, despite the testimony of USOA's counsel that he had been concerned as to the effect of the Referee's order of dismissal, he admittedly neither reviewed the applicable rule of procedure (Federal Rules 41(b) and (c)) nor made any effort to seek his desired recital in a written form of order submitted to him on the day of, or the day following, the hearing at which the Referee orally expressed his decision to order the dismissal of USOA's counterclaims (Doc. 33e, pp. 639-40; 697-98; Exh. 113e).

In any event, it must be noted here—since petitioners have totally failed to apprise this Court—that subsequent to the opinion of the District Court herein and prior to the affirmance by the Court of Appeals for the Second Circuit, Referee Lipkin had occasion to rule with respect to the intended effect of his own order and has laid to rest any

question concerning his true intentions. Thus, after the Notice of Appeal herein was filed in the Court of Appeals for the Second Circuit (and almost five years after the order of dismissal was entered), USOA, represented by two of the three attorneys for petitioners herein, filed a petition before Referee Lipkin seeking to reform his order of dismissal to reflect that it was intended to be "without prejudice". USOA alleged the very same facts asserted by petitioners in the trial court herein, including the testimony annexed as Appendix B to the Petition for Writ of Certiorari herein.

In a 20-page opinion dated November 15, 1972 and issued while the appeal herein was pending in the Court of Appeals, Referee Lipkin outlined the various events leading up to the dismissal and unequivocally refused to reform his order of dismissal dated August 29, 1967. Thus, Referee Lipkin concluded:

> *There is no basis in fact or law for me to now declare that my Order of August 29, 1967 was without prejudice.* * * *
>
> Aside from the rule of comity that should be applied in this case [referring to the District Court's opinion herein] *I find independently that FRCP 41(b) must be applied, dismissing the counterclaim with prejudice and I further find that the Petitioner is not entitled to any relief under the provisions of FRCP 60(a) and (b).*
>
> I have, with great length, gone into the proceedings before me to clearly indicate that *USOA through Mr. Cox has had the fullest opportunity to prove the facts in other courts namely the State Court and this Court, which he would seek to prove in his suits in the Southern District of New York, and he failed to do so.* That opportunity was available to him as early as June 1966, before Judge Wick in the State Court when he was represented by the same counsel that appeared before me in August, 1967. After the case left the

> State Court and came before me he had all that time for preparation of trial, namely June 1966 to August 1967, and he did not do so. *His conduct was most dilatory though I adjourned the final hearing on the counterclaim before me from May until August when I finally dismissed it.*
>
> This case clearly calls for application, and consistent with the determination of Judge Bauman, of FR [sic] 41(b) and (c) . . . (Exh. Ae, pp. E-20-21) Emphasis added.)*

No petition for review of Referee Lipkin's decision of November 15, 1972 was ever filed and, as indicated above, petitioners do not even acknowledge its existence in their Petition for Writ or Certiorari.

Argument

Further review of the issue presented by the Petition herein is not warranted. The language of Rule 41(b) of the Federal Rules of Civil Procedure unequivocally requires the construction made by the District Court and affirmed by the Court of Appeals that the Referee's order of dismissal was *with* prejudice. Petitioners' argument that the Rule raises only a "rebuttable presumption" is unsupported by any precedent and contrary to the principle that prior orders may not be collaterally attacked by extrinsic evidence. Moreover, petitioners' claim that extrinsic evidence established that the true intention of the Referee was to enter his order *without* prejudice is factually baseless. The Referee who issued the order of dismissal has flatly stated that it was intended to be *with* prejudice. Even in the absence of such a statement, the District Court after hearing all of the extrinsic evidence

---

* The state court proceeding referred to in Referee Lipkin's opinion was a proceeding brought by petitioner Cox and USOA seeking to restrain respondent's enforcement of petitioner Cox's guaranty and the sale of USOA's collateral.

offered by petitioners, still found that the order of dismissal was intended to be *with* prejudice. Finally, petitioners' claim that Rule 41(b) "effects a different ultimate result than state law when applied to the same point" (Petition, p. 2) is untrue, is irrelevant by virtue of the Referee's recent opinion, and is untenable in light of the exclusive applicability of the Federal Rules of Civil Procedure in this case.

I

The decision below is clearly correct.

Since Referee Lipkin's order of dismissal was based on a failure to prosecute and was silent with respect to whether it was to be "with" or "without prejudice", the District Court properly held, pursuant to the specific language of Rules 41(b) and (c) of the Federal Rules of Civil Procedure, that the order of dismissal was deemed to be "with prejudice" and therefore constituted an additional basis for imposing the doctrine of *res judicata* against petitioners (Petition, p. 21). The District Court's opinion on this point is supported by a host of prior decisions. See, *e.g., Nasser* v. *Isthmian Lines,* 331 F.2d 124 (2d Cir. 1964); *Kern* v. *Hettinger,* 303 F.2d 333, 339-340 (2d Cir. 1962); *American Nat. Bank & Trust Co. of Chicago* v. *United States,* 142 F.2d 571 (D.C. Cir. 1944); *Perlman* v. *332 West Seventy-Second Street Co.,* 127 F.2d 716 (2d Cir. 1942); *Hicks* v. *Bekins Moving & Storage Co.,* 115 F.2d 406 (9th Cir. 1940); *Fischer* v. *Dover S.S. Co.,* 121 F.Supp. 528 (E.D.N.Y. 1954); *Broder* v. *Hartford Acc. & Indemnity Co.,* 106 F.Supp. 343, 346 (D.D.C. 1952); *Larsen* v. *O'Reilly,* 11 F.R.D. 604 (S.D.N.Y. 1951); *Cf. Weissinger* v. *United States,* 423 F.2d 795 (5th Cir. 1970).

Petitioners have no real basis for disputing the District Court's legal conclusion and thus have cited no case contrary to the above citations. Rather, petitioners argue that

the District Court erroneously "disregarded" certain oral testimony—parol evidence so to speak—that allegedly demonstrated that the order of dismissal was really intended to be "without prejudice". However, there is nothing in the District Court's opinion to indicate that it "disregarded" any testimony or other evidence on this point. The opinion of the District Court clearly sets forth the ultimate facts with respect to the order and the court's legal conclusion (Petition, pp. 19, 21). But even if the District Court had disregarded any such evidence as to what petitioners claim the Referee's "real intentions" were, it is clear that the District Court would have been acting in accordance with the well-accepted rule that a prior order cannot be modified by extrinsic evidence. *American Nat. Bank & Trust Co. of Chicago* v. *United States, supra* at 572; *Kern* v. *Hettinger, supra* at 340; *Weissinger* v. *United States, supra* at 798 ("This sentence [*i.e.*, the last sentence of Rule 41(b)] seeks to avoid 'any need for speculation as to the intent of the court and the effect of its dismissal order where the order fails to indicate whether or not it is with prejudice.' ")

These last-cited cases conclusively refute petitioners' attempt to impose a "rebuttable presumption" test under Rule 41(b) (Petition, p. 11). Significantly, the Petition for Writ of Certiorari does not cite a single decision subsequent to the enactment of Rule 41(b) which supports the "rebuttable presumption" theory.

In any event, if the courts below were to search outside the confines of Referee Lipkin's order of August 28, 1967 for his "real intention", it is submitted that such a search would have to begin, and conclusively end, with Referee Lipkin's own expressions on the matter in his very recent opinion on precisely this subject (Exh. Ae). Thus, as set forth earlier, Referee Lipkin has—ironically upon a "motion for reformation" made by counsel for the petitioners on behalf of USOA—unequivocally stated and independently ruled that his prior order of dismissal was to be

deemed *factually and legally "with prejudice"* (see pp. 6-8, *supra*). Unfortunately, petitioners have failed to apprise this Court of the existence of this opinion, but have obviously failed to do so because standing alone the opinion fully disposes of any contention that the District Court misinterpreted the Referee's order of dismissal.*

However, even in the absence of Referee Lipkin's recent opinion, it is clear that the record herein contains no extrinsic evidence which would lead one to believe that Referee Lipkin intended his order to be "without prejudice". Indeed, based on the fact that defendants' only witness on this point, USOA's former counsel, testified that he had specifically asked Referee Lipkin as to whether the order was to be "with" or "without" prejudice and that Referee Lipkin refused to say it was "without prejudice" and stated only that "it was dismissed" (Doc. 33e, pp. 682, 693 and 697; Exh. Ae, p. E-14); and based on the further fact that USOA's counsel totally failed to review the applicable federal law (Rule 41(b)) or seek a written insertion of the words "without prejudice" in the order, either before or after it was signed (Doc. 33a, pp. 639-640; 697-698), it is clear that the District Court's decision on this issue was neither factually nor legally erroneous. The case of *American Nat. Bank & Trust Co. of Chicago* v. *United States, supra,* is on all fours in this regard.

Petitioners' reliance on some vague colloquy before Referee Lipkin allegedly concerning the availability of respondent for service of process (Petition, p. 5) can hardly have been grounds for the District Court to have departed from the clear language of Rule 41(b). Nor would such a

* Referee Lipkin's opinion has some special additional significance on this appeal because it was rendered (a) in answer to a motion which really constituted an attempt by the present petitioners to collaterally attack the District Court's opinion and (b) in the face of the same testimony—by USOA's former counsel, William P. Doherty, Jr., Esq.—which testimony petitioners claim was disregarded by the District Court.

departure have been warranted merely because USOA's counsel, in his own self-interest and without basis, chose to characterize the order in a letter to petitioner Cox (Exh. 113e) as being "without prejudice" (Petition, pp. 5-6) when, in fact, the order itself was clearly silent on the point and counsel was aware that Referee Lipkin had expressly refused to use those words (Exh. Ae, pp. E-5, 21-22).

Finally, as to petitioners' claim that the District Court should have looked to the law of New Jersey to determine the effect of Referee Lipkin's order of dismissal, it need only be noted that the order of dismissal was rendered in a federal court subject only to the Federal Rules of Civil Procedure (General Order in Bankruptcy 37; 1 Collier in *Bankruptcy*, ¶ 2.81 (14th ed. 1971)); that the order was not rendered in a proceeding based upon diversity jurisdiction; and that the evidence at trial did not even establish that the law of New Jersey was contrary.*

However, even if the procedural rules of New Jersey were contrary to the Federal Rules of Civil Procedure, the District Court properly applied Rule 41(b) regardless of its effect upon the outcome of the litigation. See, *e.g.*, *Hanna* v. *Plumer*, 380 U.S. 460, 468-70 ("The Erie rule has never been invoked to void a Federal Rule."). Thus, in *Kern* v. *Hettinger*, *supra*, the Second Circuit squarely rejected the contention that a district court sitting in a diversity action was required to follow the California law and hold that another federal court's order of dismissal for lack of prosecution was (unlike Rule 41(b)) without prejudice to a subsequent action:

> "It would be destructive of the basic principles of the Federal Rules of Civil Procedure to say that the effect

---

* In fact, contrary to petitioners' assertion, under the New Jersey rules of procedure, an involuntary dismissal for failure to prosecute, like Rule 41(b), apparently operates as an adjudication on the merits unless the order of dismissal specifies otherwise. See New Jersey Civil Rule § 4:37-2(d) (Eff. September 8, 1969); Id., § 4-42-2(b) (Eff. September 9, 1953); Id., § 1:2-4.

> of a judgment of a federal court was governed by the law of the state where the court sits simply because the source of federal jurisdiction is diversity * * *. [W]e think it would be strange doctrine to allow a state to nullify the judgments of federal courts constitutionally established and given power also to enforce state created rights. The Erie doctrine, [Erie R. Co. v. Tompkins, 304 U.S. 64 * * *] is not applicable here * * *." 303 F.2d at 340.

Indeed, in *Byrd* v. *Blue Ridge Rural Electric Cooperative, Inc.*, 356 U.S. 525—inexplicably relied upon by petitioners—this Court held that in a diversity action the federal court was *not* bound by the state law's limitation of the issues submitted to the jury, even though the absence of such a limitation might change the outcome of the suit. Of course, where the first court's jurisdiction is predicated not upon diversity but federal law (*i.e.*, the Bankruptcy Act), the considerations governing the Erie doctrine—forum-shopping and the inequitable administration of the laws—are absent, and there is no reason to interpret its order in accordance with state law. *Cf. Hanna* v. *Plumer*, *supra*, at 467-48.

II

The petition does not raise any issue requiring review by this Court.

Petitioners do not claim that the decision below is in conflict with any other decision construing Rule 41(b), nor do they claim that the language of that statute is ambiguous. To the extent that petitioners attempt to create an *Erie R. Co.* v. *Tompkins* issue because an allegedly different New Jersey rule of procedure would have been "outcome determinative", they are raising an issue which is factually unsupported and which in any event has been unanimously decided against them by this Court in *Hanna*

v. *Plumer, supra.* The adoption of petitioners' argument would undermine the uniform application of the Federal Rules of Civil Procedure and, if carried to its logical conclusion, would replace the Federal Rules with a different code of procedure for each state. It is ironic that petitioners should urge such a radical departure from the well-settled law in a case where, even if their position was adopted, the ruling below would not be disturbed because the very court which entered the order has stated that it in fact intended to dismiss *with* prejudice.

The mandate of the statute is clear, and the application of that statute by the courts below was both factually and legally correct. Further consideration of the issue presented by the Petition for Writ of Certiorari would not serve the interests of the courts, other litigants, or even the petitioners herein. There is no issue raised herein which is worthy of review by this Court, and the Petition for Writ of Certiorari should be denied.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

GEORGE A. KATZ
Attorney for Respondent

Of Counsel,

BERNARD MINDICH
ALLEN P. ROSINY
WACHTELL, LIPTON, ROSEN & KATZ